No. 18,437

IN THE UNITED STATES COURT

OF APPEALS FOR THE NINTH CIRCUIT

BUCK WITT

Appellant,

V.

UNITED STATES OF AMERICA

Appellee.

APPEAL FROM THE UNITED STATES

DISTRICT COURT FOR THE DISTRICT OF OREGON

APPELLANT'S REPLY BRIEF

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I

Appellee discusses three types of deviation from the scope of employment at pages 11 and 12 of its Brief:

A. The Nature of the Activity.

Under this head, Appellee contends, at page 18, footnote 4, that Ballweber and Wood were engaged by the Army to fly cargo to Yakima, not hired to visit their families in Oregon or to engage in training there at an unauthorized airstrip.

Appellee appears to have overlooked the applicable and controlling rule or test of vicarious liability in this juris-

diction, to-wit: Was the servant, at the time of the tortious conduct, doing anything in furtherance of his master's business? The two leading Oregon cases announcing this rule, Dalrymple v. Covey Motor Company, (1913) 66 Or. 533, 135 Pac. 91; and Tyler v. Moore, 11 Or. 499, 226 Pac. 443, quoted and discussed at pages 18-20 of Appellant's Brief, received no comment in Appellee's Brief, notwithstanding their relevance to the question of vicarious liability presented in the instant case.

It is undisputed that pilots Ballweber and Wood were, at the time of the injuries to plaintiff, engaged in their normal employment activity, and were not visiting with family.

It is significant that Lt. Wood was asked by his Command to accompany Ballweber on this trip for the very purpose of acquiring additional instruction and training in this aircraft (R. V.II, 160), and that Lt. Ballweber was an instructor-pilot in his squadron expressly authorized and qualified to give flight instruction to other pilots in the squadron. This is precisely the activity in which these pilots were engaged, respectively, at the time plaintiff was damaged. The "nature of their activity" on May 7, 1961, could not correspond more completely with the nature of their duty activity and assignment in their home squadron than it did on this occasion (R. V. II, 118, 121-123).

B. The Deviation Can Relate to Time. (Ap. Br. 11)

As previously pointed out, the pilots were delayed a day in departing from Fort Carson. Even if they had left as originally planned on May 5, they were due back to Fort Carson "on or about" May 8. (R. V.II, 131). This incident occurred on May 8. However, due to their delay of one day in departing, they

between May 6 and May 9 (R. V-II, 143). Certainly, from the standpoint of time, they were within the scope of their employment. Or, stated conversely, from the standpoint of time, likewise not a deviation.

C. Geographical Deviation.

Appellee states: "The servant is considered to have engaged on a frolic of his own when his conduct takes him to a locality different from that authorized." (Ap. Br. 11). It is appropriate to again point out that neither the verbal nor the written orders given to Lt. Ballweber "prescribed" a given route to Yakima and return (R. V.II, 130-133). Further, there is no testimony on the part of any of the three Army officer-pilots who testified in behalf of defendant that orders for service missions ever prescribed a definite route. Lt. Wood testified that the prescribed route is the shortest route, and that deviations are authorized only because of weather or mechanical problems (R. V.II 178). He also testified that rated instrument pilots, such as Lt. Ballweber, are authorized to clear their own flights. Their intended route requires no prior approval (R. V-II, 173).

It was apparent to all who observed the demeanor of Lt. Wood at the trial that he was an intelligent, conscientious and dedicated Army officer. He testified that prior to departure, he, Sgt. Kuhn and Lt. Ballweber discussed the proposed flight into Oregon. Without question, he had knowledge of the proposed flight into Oregon. It is extremely unlikely that he would have consented to such a flight if he really believed that such a mission

orders or policy. On the contrary, he knew that such flights for purposes wholly unrelated to the accomplishment of the specific mission involved were common, well-established by custom and practice in the flying branch of the military services (R., V.II, 182).

Also relevant is a consideration of the ratios between the over-all flying time and air mileage between Fort Carson and Yakima, and the flying time and mileage from Yakima to the Lenhardt airstrip in Oregon. This proportion is comparatively insignificant. The total one-way distance from Fort Carson to Yakima is in excess of 1700 air miles. On the other hand, the flying distance between Yakima and the Lenhardt airstrip, 20 miles south of Portland, is approximately 170 air miles, a ratio of about 10 to 1. The actual flying time reported in the Aircraft Flight Report (Exhibit 28-A), from Fort Carson to Yakima is 10 and 1/2 hours. The Aircraft Flight Report further indicates, at page 3, that they departed Yakima at 4:30 P.M.; Ballweber testified they arrived at the Lenhardt strip "about 5:00 P.M." (R., V.II, 99). It is probable that this flight took between one and one and one-half hours because of the distance involved. Therefore, the ratio of flight time between Fort Carson to Yakima and between Yakima to the Lenhardt strip is approximately 10 to 1.

Moreover, there was no "geographically prescribed area" (Ap. Br. 12) to abandon. The orders gave no prescribed route. They did not fly in the "opposite direction" (Ap. Br. 12; R., V.II, 208). The approximate compass heading from Yakima to Fort Carson is 135°, or in the general direction of southeast. The approximate compass heading from Yakima to the Lenhardt airstrip

is 210°, or a general direction of south-southwest from Yakima. The "opposite direction" from Yakima would be a compass heading of approximately 315°, or a general direction of northwest, toward Seattle and Alaska.

Appellee cites the case of Jasper vs. Wells, 173 Or. 114, 144 P 2d 505, three times on page 11 of its Brief in support of each of the three types of deviation discussed. The Opinion reads as follows, at pp. 126 and 127:

> "To be within the scope of the employment, conduct must be of the same general nature as that authorized or incidental to the conduct authorized. I, Restatement of the Law of Agency, §229".

Whereas the conduct of the employee in Jasper at the time of the damage to plaintiff differed from the nature of his employment duties, the conduct of the employees involved in the instant case was identical to their primary duties with their squadron.

With reference to the time factor of deviation, Jasper quotes further from the Restatement of Agency:

> " 'Conduct of a servant is within the scope of employment only during a period which is not unreasonably disconnected from the authorized period'. Restatement of Agency, §233, p. 520".

Clearly the time involved in our case is "not unreasonably disconnected from the authorized period"; on the contrary, the flights occurred during the period covered by the orders.

Quoting further from the Jasper Opinion:

> "Conduct is within the scope of employment only within a locality not unreasonably distant from the authorized area. Restatement of Agency, §234, p. 524".

In view of the time and distance ratios and directions of flight enumerated above, it cannot be said that the locality involved

in the instant case was unreasonably distant from the authorized area, if, indeed, there was any "authorized" or "prescribed" area in the first place.

II

Appellee contends that under Rule 52 (a), Federal Rules of Civil Procedure, the Findings of Fact of the trial court when sitting as the trier of fact, may not be disturbed on appeal unless shown to be clearly erroneous. At page 14 of its Brief, Appellee states that the Oregon Supreme Court has repeatedly held that the question of whether an employee is acting within the scope of his employment is normally a question of fact, to be resolved by the trier of facts, citing Barry v. Oregon Trunk Rwy., 197 Or. 246, 255; 253 P 2d 260. The Barry case teaches us as follows:

> "Ordinarily, it is a question of fact for the jury to determine whether a wrongful act committed by a servant is within the real or implied scope of his authority. Where, however, the facts attending the injurious occurrence are not disputed, and the evidence is susceptible of but one conclusion, the question is one of law for determination by the Court. 35 Am Jur., Master & Servant, 1040, §600." (Id., 255). Accord Dalrymple vs. Covey Motor Co., supra, at 541.

The facts attending the injurious occurrence in the instant case are undisputed. The only conflict in the testimony of the three pilots was regarding the question of established practice of Army pilots on cross-country missions. The undisputed testimony is that these two pilots were engaged in training activities consisting of a series of power-on approaches between 4:00 and 6:00 P.M., May 8, 1961. At that time, the plaintiff was

damaged as the direct result of the flights over his property. There is no dispute as to how the Army aircraft and the two pilots happened to be in that area on that date. The sole question is: Were they at the time acting within the scope of their employment? This is a legal question for the court. There is no question of fact for the fact-finder to resolve. Therefore, Rule 52(a) of Federal Rules of Civil Procedure does not apply.

III

At page 15 of Appellee's Brief, the following appears:

> "If Ballweber's testimony did not furnish an ample basis for the district court's finding that these Army personnel were not within the scope of their employment, certainly the testimony of Lieutenants Wood and Terpstra warranted such an inference."

The well-established agency rule in this State is stated as follows:

> "When the ownership of an automobile involved in a collision is established, unless the owner presents evidence showing that the driver thereof was not the agent or employee of the owner, and acting within the scope of such agency or employment, such owner is chargeable with the result of the driver's negligence in operating the automobile. (citing cases)" Allum v. Ball, 168 Or. 577, 580; 124 P 2d 533 (1942).

Defendant failed to come forward with any competent, affirmative evidence rebutting the presumption of agency, which, under Oregon law, follows from proof that the defendant owned the vehicle involved in the tortious conduct. Defendant produced the co-pilot, Lt. Wood, and a Lt. Terpstra, who was wholly unconnected with the flight in issue, or with the squadron to which Ballweber and Wood were attached. Neither witness had any authority to speak in behalf of defendant on the issue of agency.

Defendant failed to produce the commanding officer or immediate superiors of these two pilots, who are the military equivalent of one's civilian employer, supervisor or department head. Lts. Wood and Terpstra were merely fellow employees of Ballweber, the pilot. Defendant failed to produce one officer of command rank or policy level to testify either that such conduct was not authorized or that such was an established custom and practice.

While Appellant recognizes that Lts. Wood and Terpstra, as employees of the defendant, are entitled to give their opinion concerning the policy of the Army with reference to deviations on cross-country or service missions, (R. Vol. II, 208 and 182 &183), Appellant would point out that since neither Wood nor Terpstra hold a rank of command or policy level in the Army, their testimony, while competent, is hardly entitled to much weight, even if it were uncontradicted. And their testimony was contradicted by that of Ballweber insofar as custom and practice and latitude of discretion regarding choice of route on a service mission are concerned. (R., V.II, 102, 128, 147, 149, 173). All three pilots did agree that deviations from the most direct route on a service mission frequently occurred throughout the aviation branch.

If Lt. Wood truly felt this route was such an objectionable and flagrant breach of "orders", as his testimony would have us believe, it is highly unlikely that he would have consented or agreed to it before departing from Fort Carson. He and Ballweber discussed this route and stopover in Canby before leaving Fort Carson. It was their pre-conceived plan. (R., V.II, 149, 176). An intelligent and conscientious officer such as Lt. Wood would

not have participated in something so much out of line as he says, if he truly believed it to be so.

IV

Appellee cites four Oregon cases dealing with scope of employment at page 20 of its Brief. None apply to the instant case.

The defendant's employee, Freytag, in Hantke v. Harris Ice Machine Works, 152 Or. 564, 54 P 2d 293, was driving his daughter and two of her friends to school in his own automobile at the time of the accident. His intention was to then proceed on to his fixed place of employment at the defendant's plant after dropping the girls off at school. Clearly, at the time of the accident, he was not acting within the scope of his employment and was in no way acting for the benefit of his employer. The defendant's employee in Allum v. Ball, 168 Or. 577, 124 P 2d 533, had been given permission to drive the employer's Chevrolet automobile to town to obtain his chauffeur's license, but did not have either express or implied authority from his employer to drive the log truck cab which he was driving when the accident occurred. The employee, Handel, in Crosby v. Braley and Graham, 171 Or. 72, 134 P 2d 110, was operating his own automobile at the time of the accident. He had left the car lot of defendant, which was his fixed place of employment, and was on his way home when, according to his testimony, he remembered he had failed to lock one of the cars on the lot, and decided to return to the lot to do this. And the employee, Dake, in Jasper v. Wells, supra, was operating his employer's pickup truck on a Sunday, not a workday,

without any authority or permission from his employer to do so. His normal occupation was not driving; he was a "loader" in defendant's logging operation. The Court found that his testimony regarding hiring someone to work for the defendant was "a mere afterthought". (Id., 127). Obviously, none of the foregoing fact situations apply to the instant case.

V

The opinion of the trial judge in a 1961 case brought against the United States under the Federal Tort Claims Act, Sievers v. U.S., (D.C.-Oregon, 1961), 194 F Supp 608, contains a rather exhaustive discussion of Oregon scope of employment cases. This Opinion is referred to here because it categorizes many of these cases as follows: Fixed place of employment cases are distinguished from cases where the employee travels and has no fixed place of employment. Another category is "transfer cases" such as was involved in Sievers, and also in one of the cases cited frequently in Appellee's Brief, Chapin v. U.S., 258 F 2d 465 (C.A.9, 1959). The transfer cases are distinguishable from the instant case in that they involve military personnel who are in the process of transferring from one duty station to another duty station, under orders, but usually given a substantial period of time, considered leave, to make the transfer, and are permitted to choose their route and their mode of transportation. Accordingly, they have been generally held to be not within the scope of their employment, since they are usually operating their own vehicle along a route selected by them and not by the employer. This category of cases is not applicable to the instant case.

At page 21 of Appellee's Brief, the case of U.S. v. Taylor, 236 F 2d 649 (C.A. 6, 1956) is discussed. Appellee says that Taylor presents a much more favorable factual situation for the plaintiff in the Court of Appeals than does the instant case. However, a close reading of the case reveals the contrary. It will be noted that the employee-pilots involved in Taylor were expressly ordered and limited to a 90-mile radius in which to train. In clear violation of their limiting instructions, they flew the aircraft 300 miles away and flew at extremely low altitudes over the pilot's hometown. Obviously they were not engaged in training and were therefore outside the scope of their employment. There is an able, well-reasoned, dissenting opinion, which advocates rejecting the deviation defense used by employers in automobile cases, because of the inherently dangerous character of airplanes.

Appellee also attempts to distinguish Murphy v. U.S., 179 F 2d 743 (C.A. 9, 1950). It will be recalled that Sgt. Brander's immediate superior testified that Brander was not "free" to use the truck for his own purposes during the evening in town. Notwithstanding this clear testimony by the commanding officer of the wrong-doing employee, this court reversed the District Court Judgment dismissing the complaint, and held that Brander was acting within the scope of his employment at the time of the injury to the plaintiff's decedent. In the instant case, defendant did not put on any evidence to rebut the presumption of agency and did not produce any testimony from the commanding officer of the pilots involved to the effect that the conduct was outside the scope of their employment or unauthorized.

At pages 22 and 23 of Appellee's Brief, there is a statement that the general activity in which the employee is engaged must be authorized for the employee to be considered as acting within the scope of his employment, citing four Oregon cases. This is true. It is equally true, as has been previously pointed out, and as clearly shown by the testimony in the instant case, that the specific activity being engaged in by the pilots at the time of injury to the plaintiff was of the same general class or type of activity which they were employed to perform for the defendant -- flying, and, specifically, flight training.

VI

Ratification

Appellee argues that this conduct could not have been ratified by the employer, since the employer did not have full knowledge of all of the facts. Referring again to Exhibit 28, the Aircraft Flight Report, the pilots in two places on this Report listed their locality while in Oregon: at page 3, which is a record of their flying activities on Sunday, May 7, 1961, shows "PDX-EUG". These designations stand for Portland-Eugene area. They appear again at page 7 of the Report. The information contained in this Report is sufficient, by itself, to inform the employer and immediate superiors of Lts. Ballweber and Wood of their whereabouts and activities on May 8, 1961, even in the absence of the investigation conducted subsequent to the filing of Buck Witt's claim with the Army. (R., V.II, 148). It is indeed fatuous to suppose that the employer of these pilots, the United States Army, knew less than the full situation within a short

time after Buck Witt filed his claim with the Army at Fort Lewis, Washington.

It is further significant that the flying activity which occurred between 11:00 A.M. and 4:00 P.M. on May 8, 1961, was not listed by Ballweber and Wood on the Report. Only the actual training flights and number of training landings were recorded. (R., V.II, 118 and 171).

Again, it is significant that the defendant failed to come forward with any evidence showing that the employer had no knowledge of the events of May 8, 1961. In fact, counsel for the Government admitted, at page 134, Volume II of the Record, in response to a question by the court, that there was a written report and an investigation. Ballweber testified that his immediate, more experienced superiors in the squadron suggested that he attribute the cause of delay to bad weather (R., V.II, 148).

CONCLUSION

Under the controlling Oregon and Ninth Circuit authorities on the question of scope of employment, the decision of the District Court must be reversed and this cause remanded for further proceedings on the issue of plaintiff's damages.

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April, 1963.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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I hereby certify that I served the foregoing Appellant's Reply Brief on Morton Hollander and John C. Eldridge, attorneys for defendant, on the 26th day of April, 1963, by mailing to them three copies thereof. I further certify that said copies were placed in a sealed envelope addressed to Morton Hollander and John C. Eldridge, Attorneys, Department of Justice, attorneys for defendant, at Washington 25, D.C., their last-known address, and deposited in the Post Office at Gresham, Oregon, on the 26th day of April, 1963, and that the postage thereon was prepaid.

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